

In particular, an OVS operator should not be permitted to conduct any inbound telemarketing^{63/} or referrals of its video services unless it provides the same marketing on the same terms, conditions, and prices to all VPPs. The Commission should limit the inbound telemarketing or referral services provided by the OVS operator to a listing, on a rotating basis, of all video programming providers, including the OVS operator's programming affiliate, that request such a listing service. To prevent the OVS operator from using its inbound telemarketing in a manner that disadvantages a video programmer or cable operator, the OVS operator should not be permitted to include any information about the price, terms, or conditions of service offered by any video programmer or cable operator, and should be prohibited from comparing among video programmers and cable operators, or among competing program offerings on its own OVS.^{64/}

To avoid the possibility that a LEC would use its monopoly-derived customer lists to gain an unfair advantage in the outbound telemarketing of unregulated services, moreover, the Commission should bar such telemarketing at least until the LEC can show that a competing multichannel video programming distributor is engaged in the outbound joint marketing of local telephony and video services.

The Commission must also ensure that all video programmers on the OVS platform obtain access to the same customer information on a real time basis. Information regarding

^{63/} "Inbound telemarketing" refers to telemarketing or referrals that occur during a call initiated by a customer or a potential customer of the service.

^{64/} These rules are analogous to the Commission's rules governing the joint marketing of local telephone service and customer premises equipment by LECs. See Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 4 FCC Rcd 6537 (1989).

deployment should also be provided on a nondiscriminatory basis. Equal access to information about potential and actual subscribers is critical in promoting fairness on open video systems. Not only is such information necessary for billing, it is invaluable for marketing purposes. Information about potential end-user subscribers, as well as deployment plans and schedules, will allow programmers to assess the market and to advertise to those customers. OVS operators will certainly have access to that information.

Finally, under no condition should the OVS operator be allowed to market any programming package offered on its service. The Commission correctly recognized that programming providers should not be forced to relinquish control over their own products.^{65/} Permitting OVS operators to market the services offered by unaffiliated programmers would present countless opportunities for price discrimination, among other things, and discourage independent offering of competing program packages on the OVS system.

6. The Commission should require separate subsidiaries to guard against cross-subsidization and anti-competitive conduct

In order to deter cross-subsidization and anti-competitive conduct by local exchange carriers, the Commission should require LECs to operate their open video systems, and provide programming to subscribers, through an affiliate that is structurally separated from the LEC's regulated telephone operations. The separate affiliate would act independently of the telephone operating company; maintain separate books, records, and accounts; have separate officers, directors; and employees; obtain credit separately from the telephone

^{65/} NPRM at ¶ 41.

operating company; and conducts all of its transactions with the operating company on an arm's-length basis, with any such transactions reduced to writing and available for public inspection.^{66/}

While structural separation does not by itself prevent unlawful activity, it has proven useful as a means of deterring such activity by highlighting the transactions between a regulated entity and its unregulated affiliate.^{67/} The Commission has long employed this tool to ensure that the entry of monopoly local exchange carriers into competitive markets does not impede competition.^{68/} In the case of OVS, arm's-length separation between the LEC's telephone operating company and its OVS affiliate and between the "wholesale" and "retail" OVS offerings of the LEC is essential in order to provide a meaningful opportunity to detect and police the many and varied anti-competitive activities that could arise.^{69/}

With respect to Bell operating companies ("BOCs"), a structural separation requirement for OVS is also compelled by the 1996 Act. Section 272(a)(2)(C) of the 1996

^{66/}Cf. 1996 Act, § 272(b) (to be codified at 47 U.S.C. § 272(b)) (requiring public disclosure of any transaction between a Bell operating company and its separate subsidiary).

^{67/}See, e.g., In re Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communication Services by the Bell Operating Companies, 95 FCC 2d 1117, 1131 (1983), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), recon. den., 49 Fed. Reg. 26,056 (June 26, 1984), aff'd sub nom. North American Telephone Association v. FCC, 772 F.2d 1282 (7th Cir. 1985) (separate subsidiaries eliminate problem of determining proper allocation of joint costs and reduces chance of discrimination).

^{68/}See e.g., First Computer Inquiry, 28 FCC 2d 291 (1970) (data processing services); Computer II Final Decision, 77 FCC 2d 384 (1980) (same); Cellular Communication Systems, 86 FCC 2d 469, 493 (1981) (cellular services).

^{69/}See Section I.B, supra.

Act requires a BOC to establish a separate affiliate for interLATA information services.^{70/}

"Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."^{71/} The provision of video services to subscribers, whether over a cable system or otherwise, is an information service,^{72/} and the Commission has long held that the last-mile distribution of video programming is an interstate service.^{73/}

^{70/}47 U.S.C. § 272(b)(2)(C). The statute exempts from this requirement, inter alia, "incidental interLATA services" and "electronic publishing." §§ 272(b)(2)(B)(i), 272(b)(2)(C). Neither exemption is relevant here. Only "an interLATA transmission incidental to the provision by a [BOC] or its affiliate of video . . . services" is considered an "incidental" interLATA video service; the actual provision of service to the public is not an incidental service for purposes of section 271 or 272. See § 271(h). Likewise, the definition of electronic publishing specifically excludes "video programming or full motion video entertainment on demand." § 274(h)(2)(O).

Even assuming arguendo that the separate affiliate requirement does not apply to a BOC's offering of OVS, the Commission retains its authority to "prescribe safeguards" consistent with the public interest, convenience, and necessity. § 272(f)(3). The FCC's pre-1996 Act authority clearly included the power to require separate affiliates, which the Commission has done on a number of occasions. See n.46, supra.

^{71/}47 U.S.C. § 153(41). This definition is drawn from the Modification of Final Judgment, § IV(J) ("MFJ"). See U.S. v. American Tel. & Telegraph Co., 552, F.Supp. 131 (D.D.C. 1982), aff'd, sub nom. Maryland v. U.S., 460 U.S. 1001 (1983).

^{72/}See, e.g., Pepper, Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change, 4 FCC Rcd 1306, 1314-15 ¶ 72 (1988).

^{73/} See U.S. v. Southwestern Cable Co., 392 U.S. 157, 168 (1968).

II. FORCING VIDEO PROVIDERS TO MAKE THEIR PROGRAMMING AVAILABLE TO RIVALS ON AN OPEN VIDEO SYSTEM WILL STIFLE COMPETITION

The Commission rightly recognized that programmers have a right to exercise control over their own product.^{74/} This point extends beyond channel sharing arrangements and applies with equal force to the applicability of the program access rules.^{75/} Congress itself limited the applicability of the program access rules to operators of open video systems;^{76/} nothing in the 1996 Act suggests that programmers must provide their services to competing users of an open video system. The Commission should make clear the limited reach of program access in the context of OVS.

In this context, Rainbow's experiences are again instructive. It can be no coincidence that, having thwarted Rainbow's efforts to obtain its own capacity on their video platforms, SNET, US West, and Bell Atlantic -- through their respective proxies CCT, Interface, and FutureVision -- have all sought to use the program access rules to demand Rainbow's programming for their own use.^{77/} If they succeed and Rainbow is forced to provide

^{74/} NPRM at ¶ 41.

^{75/} 47 U.S.C. § 548. See 47 C.F.R. §§ 76.1000 et seq.

^{76/} 47 U.S.C. § 573(c)(1)(A). The program access rules impose particular obligations on cable operators, separate and apart from the requirements imposed on the satellite cable programming vendors. Like cable operators, OVS operators would be precluded from . . . See § 548(b).

^{77/} See CAI v. Cablevision Systems, Inc. [sic], File No. CSR ____ (dismissed without prejudice after SNET withdrew its video dialtone applications, Order, DA 96-283, rel. March 12, 1996); Interface Communications Group, Inc. v. American Movie Classics Company and Rainbow Programming Holdings, Inc., File No. CSR ____, filed Jan. 16, 1996; Digital Video Services [formerly FutureVision] v. Cablevision Systems Corp. and Rainbow Programming Holdings, Inc., File No. CSR ____, filed March 12, 1996.

programming to one of its potential competitors on an open video system, Rainbow will effectively be foreclosed from competing directly for subscribers.

The OVS framework contemplates that all video programmers will compete on equal terms if they choose to obtain capacity on the platform. Enabling Interface or FutureVision to forcibly obtain the Rainbow's programming would fundamentally undermine the very competition OVS is intended to promote. The OVS platform is designed to enable multiple program providers to bring their offerings directly to consumers in competition with each other and the system operator. Market forces are given full play under such a scheme.^{78/}

Applying program access to the relationships between programmers on the platform is directly contrary to the OVS model. If one VPP can demand gain access to another's programming, there would be little or nothing left to the second VPP's "right" to gain capacity for itself; its programming would already be available on the platform, with its access to the platform effectively usurped. Inter-programmer competition would become a nullity under such a scenario.

On an OVS, each programmer is the equal of every other with respect to access to the platform. Applying program access rules in a manner that makes some programmers more equal than other can only hamstring competition as VPPs attempt to use the program access rules to obtain for themselves the rights to program services that would otherwise compete against them. The Commission cannot countenance such a result.

^{78/} See Second Report and Order, 7 FCC Rcd at 5795-96; 5787 ("Free market forces, rather than governmental regulation, determine the success or failure of new services.")

To allow VPPs to use the program access rules to acquire the programming of their competitors would reduce the number and diversity of voices available through open video systems, dampen competition, and harm consumers. Potential new programmers would have dramatically reduced incentives to roll out new offerings on OVS, since they would be forced to relinquish their programs to their competitors. It would be easy, moreover, for a dominant VPP -- probably an affiliate of the OVS operator -- to thwart competition by demanding access to channels owned or controlled by non-affiliated, competing VPPs that have fewer channels. With fewer channels, and a reduced ability to distinguish themselves from the dominant VPP, there would soon be nothing to keep any competing programmer on the platform.

III. THE COMMISSION SHOULD IMPLEMENT AN EFFECTIVE DISPUTE RESOLUTION PROCESS

If OVS is to succeed as Congress intended, it is absolutely essential for the Commission to establish an effective dispute resolution process.^{79/} An effective process demands clear rules, speedy resolution of grievances, and delivery of effective relief to injured parties. Congress ensured speedy resolution of grievances by requiring all complaints to be addressed within 180 days.^{80/} The Commission must provide clear rules and ensure that relief is available.

An effective dispute resolution process must guarantee aggrieved programmers with an immediate right of access to the OVS platform at issue for programmers who have been

^{79/} See NPRM at ¶ 72.

^{80/} 47 U.S.C. § 573(a)(2).

denied such access. Without this right, the process will be devoid of value, since time is absolutely of the essence in establishing a viable programming service on a shared platform. Once an OVS operator denies access to a VPP, the damage is done. No remedy will compensate the VPP for its delayed entry into the market. Customers cannot be required to change their minds about the programming packages they have selected.

Furthermore, the Commission must require an expedited process for resolving allocation, capacity, and service information disputes. These issues all affect the critical start-up period, when each VPP is developing its marketing and rollout strategy. Discrimination poses a significant threat to business viability at this nascent stage. If a programmer is allocated fewer channels than necessary to offer a marketable package, or if customers are not provided with important marketing materials, that programmer will inevitably be handicapped in the market. Consumers will suffer because of the resulting decline in program choice and diversity.

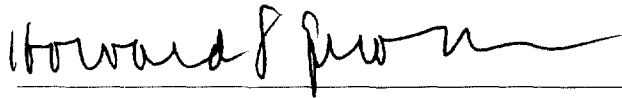
A meaningful dispute resolution process is also essential to stimulate and encourage the development of new programs for open video systems. If the Commission fails to provide a process that can address the needs of aggrieved programmers, there will be a significant chilling effect on programmers' incentive to participate in open video systems. No programmer can be expected to invest the time and money necessary to expand its offerings into open video systems if it cannot protect itself from potential anti-competitive behavior.

CONCLUSION

For the reasons set forth herein, the Commission should adopt rules that ensure equitable and nondiscriminatory treatment for unaffiliated programmers seeking access to an open video system. Absent such rules, as Rainbow can attest, OVS will frustrate rather than promote the robust competition envisioned by Congress.

Respectfully Submitted,

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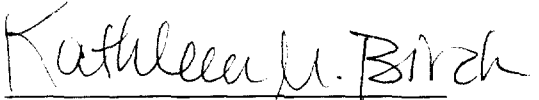
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April 1, 1996

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CERTIFICATE OF SERVICE

I, Kathleen M. Birch, hereby certify that on this 1st day of April, 1996, I caused copies of the foregoing "Comments of Rainbow Programming Holdings, Inc." to be sent by first-class mail, postage prepaid, or to be delivered by messenger(*) to the following:


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